

APPENDIX D, ADMINISTRATIVE PROCEDURES ACT MONTGOMERY COUNTY CODE, CHAPTER 2A

ARTICLE I. APPEALS FROM ADMINISTRATIVE AGENCIES.

Sec. 2A-1. Declaration of policy and legislative intent.

It is hereby declared to be the policy of Montgomery County, Maryland, to provide for and ensure the realization of administrative due process with respect to specified appeals and contested matters which are subject to hearings before enumerated boards, commissions, offices and other administrative agencies performing quasi-judicial functions; and to provide where feasible, uniformity in procedures and regulations governing the processing of administrative appeals and other matters which require administrative and/or quasi-judicial hearings. It is the intent of the County Council to protect those legal rights afforded to affected parties who utilize and are subject to the administrative hearing processes established by the laws and ordinances of the County.

Sec. 2A-2. Applicability.

This Chapter governs the following administrative appeals and proceedings and applies equally when a hearing is conducted by a hearing examiner or another designated official.

- (a) Complaints and actions involving discriminatory acts or practices prohibited under Article I of Chapter 27, as amended, for which hearings are provided or required by that chapter before the Montgomery County Commission on Human Relations or specified panels of said commission.
- (b) Complaints and actions involving acts or practices prohibited by Chapter 29, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Landlord-Tenant Commission; fact-finding hearings conducted pursuant to subsection (c) of Section 29-58 not being subject to the provisions of this Chapter.
- (c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.
- (d) Appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County zoning ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

- (e) Complaints and actions filed with or by the Department of Housing and Community Affairs under Section 11-4 when a hearing is required or provided before a cease and desist order is issued.
- (f) Appeals and complaints filed under Chapter 5, when a hearing is required or allowed by that Chapter before the Animal Matters Hearing Board.
- (g) Such other hearings as hereinafter provided for by law or executive regulations which are specifically designated as being governed hereby. In this regard, the County Executive is hereby authorized to add or delete additional quasi-judicial authorities from time to time by executive regulation adopted under method (2) of section 2A-15 of this Code.

Sec. 2A-3. Conflicts of laws; interpretations.

- (a) Where any provision of this article conflicts with a substantive provision of an act pertaining to a particular agency, the latter shall prevail.
- (b) The provisions of this article are not intended to confer different or additional powers or jurisdiction on hearing authorities governed hereby; in this regard, this article shall be construed to be procedural rather than substantive.
- (c) The provisions set forth herein shall prevail over any agency rule of procedure and in the event of conflict, the latter shall be amended to conform with this article; provided, however, that nothing herein shall be construed to limit or restrict a hearing authority from adopting additional rules of procedure as will implement this article and the substantive provisions under which it operates so long as they are not in conflict with this article.
- (d) No action taken hereunder shall be declared invalid on the basis of procedural irregularities absent a finding of a denial of substantive due process. Substantial compliance with this article shall be sufficient.

Sec. 2A-4. Definitions.

The following words and phrases have the following meanings except when otherwise indicated in this Article.

Hearing authority: The Commission on Human Relations or a designated panel thereof; the Merit System Protection Board; the County Board of Appeals; the Landlord-Tenant Commission, the Director of the Department of Housing and Community Affairs; the Animal Matters Hearing Board; or a hearing examiner or official designated or appointed to conduct those hearings listed in Section 2A-2.

Charging party: Any person, business entity, organization or agency who properly files a charging document with a "hearing authority" seeking administrative relief.

Charging document: Any petition, complaint, appeal or grievance.

Responding party: Any person, business entity, organization or agency who is notified to defend or substantiate their actions or activities before a "hearing authority."

Sec. 2A-5. Initiation of hearing process.

Any proceeding governed by this article as specified in section 2A-2 shall be initiated by filing a charging document in writing with the office of the hearing authority on forms provided therefor. Such forms shall include or be accompanied by a written statement which may include: A description of the nature and specifics of the allegation together with reference to sections of applicable laws, ordinances or regulations, if known, which are alleged to have been violated or relied upon. The statement shall contain the nature of the relief requested and if applicable the names and addresses of the person, persons, business entity or organization or agency alleged to have committed any violation or undertaken any action which is the subject of the proceedings governed by this article. The statement may be accompanied by supporting documentation.

Sec. 2A-6. Notice of hearing.

In any administrative proceeding in which a hearing is to be held if ordered by a hearing authority, reasonable notice thereof shall be given to all parties not less than thirty (30) days before the hearing. The hearing authority shall give such notice to the charging and responding party in writing either by certified mail or by personal service at the addresses of parties as indicated in the charging document or as otherwise determined. In the event a party cannot be served after diligent and reasonable efforts have been made to locate the party, an affidavit of attempt to make service shall be filed in the record. The written notice shall contain the following information:

- (a) A copy of the charging document.
- (b) Time, place and date of hearing.
- (c) That the parties may be represented by counsel or represent themselves.
- (d) That the parties have the opportunity to present witnesses, cross-examine witnesses and present supporting documentation.
- (e) That there are pre-hearing procedure requirements as set forth in section 2A-7 hereof.
- (f) That the parties may request a continuance of the hearing by written request if made not less than five (5) days prior to the date of hearing.
- (g) That a verbatim record and transcript of the hearing will be made where said record and transcript is required by law; or, in the alternative, that any party may request that such record of the transcription be made at his or her expense.
- (h) That there is a right, subject to the provisions of the state public information law, to inspect and copy at the requesting party's own expense documents of any party, administrative authority or investigating governmental agency involved where such inspection is not otherwise prohibited by law.

Sec. 2A-7. Pre-hearing procedures.**(a) Submissions.**

- (1) In any case in which the Montgomery County government, or a department, office or agency thereof is a party, it shall submit to the hearing authority no later than twenty (20) days prior to the date set for the hearing the following information in regard to its case:
 - A. All supporting documents which are relied upon at the hearing, including investigative reports, or portions thereof. The hearing authority may in its discretion exclude from evidence any materials or documents not included in the pre-hearing submission.
 - B. List of names and addresses of all its prospective witnesses, together with summaries of their expected testimony.
 - C. List of names and addresses of any persons requested to be summoned by the hearing authority and any documents or records requested to be subpoenaed for the hearing.
 - D. Estimate of time to present case. In addition, the hearing authority, in its discretion may require any party to submit no later than ten (10) days prior to the date set for hearing any part of or all of the information required by subsection (a)(1) above.
- (2) The original of all pre-hearing submissions shall be filed with the hearing authority and a copy thereof served upon parties and/or counsel of record.
- (3) The information submitted in compliance with this section shall be construed as an intent only to submit such information or witnesses and no party shall be bound to introduce the same at the hearings.
- (4) Requests for permission at the time of the hearing or prior thereto to submit new witnesses or new or supplemental material, not contained in a pre-hearing statement and subsequent to the time limits herein specified, may be granted by the hearing authority only upon good cause shown, and may be cause for a postponement or continuance of the hearing or a decision to leave the record open for a specified time to receive rebuttal evidence. Nothing herein shall interfere with the right to offer rebuttal evidence.

(b) Discovery. Subject to the provisions of the state public information law:

- (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
- (2) No investigative agency involved in the complaint or proceeding shall unreasonably refuse to any party to a hearing access to files and personnel connected with any matter relevant to the complaint.

- (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.
 - (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. Failure of a party to submit to ordered discovery may be cause for entry of a default judgment against the offending party or such other equitable sanction as the hearing authority may deem appropriate and just.
- (c) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.
- (d) **Restrictions on data.** Unless a matter has been formally certified for hearing by the hearing authority, government documents or records shall not be subject to these provisions. In the event a matter is certified for hearing by the hearing authority, any documents or records not to be used at the hearing shall not be subject to the provisions of this chapter. Further, any matter or materials which are designated by law as confidential shall not be released without a waiver of the parties to the confidentiality.

Sec. 2A-8. Hearings.

- (a) **Time and place.** The hearing for the purpose of the taking of evidence upon a contested matter shall be held at such time and place as designated in the notices therefor, except for continued hearings. All such hearings shall be public except where otherwise ordered by the hearing authority or provided by law.
- (b) **Official record.**
- (1) The hearing authority must prepare, maintain and supervise the custody of an official record in each case. The record must include testimony, exhibits and verbatim transcript, if any, submitted during the hearing and at other times the record is open to receive evidence. Documentary evidence may be received in the form of copies, excerpts, photographic reproductions or by incorporation by reference. The hearing authority must make the official record available for inspection to all affected persons before any hearing.

- (2)
 - a. This paragraph applies to any ex parte or private communication, written or oral, received by a member of a hearing authority if:
 - (i) the communication relates to a contested matter before the hearing authority;
 - (ii) all appellate rights regarding the contested matter have not been exhausted; and
 - (iii) the hearing authority is required by law to make a decision on the matter based on the record before it.
 - b. This paragraph does not apply to:
 - (i) legal or technical advice rendered by government agency staff or an attorney for the County at the request of the hearing authority;
 - (ii) any communication about the status or procedure of a pending matter or;
 - (iii) any communication between members of the hearing authority.
 - c. If a member of a hearing authority receives an oral ex parte or private communication, that member must reduce the substance of the communication to writing within a reasonable time after receipt of the communication.
 - d. If a final administrative decision has not been made prior to receipt of the ex parte or private conversation, the hearing authority must send a written notice to all parties that discloses the contents of the communication and states whether the hearing authority will consider the communication as a basis for its decision under subparagraph e.
 - e. The hearing authority must include the ex parte or private communication in the record and may:
 - (i) consider the communication as a basis for its decision after giving all parties an opportunity to respond to the communication; or
 - (ii) decide the matter if the hearing authority expressly finds that it has not considered the communication as a basis for its decision.
 - f. The substance of an ex parte or private communication received after a final administrative decision and before appellate rights have been exhausted must be maintained in the case file and, in the event of any remand, treated in accordance with all other provisions of this paragraph.
- (3) The hearing authority may seek additional evidence if the evidence is included as part of the record and the parties are given due notice and opportunity to respond.

- (c) **Subpoena power.** The hearing authority shall have the power to issue subpoenas enforceable by injunction by the party requesting same or by the County itself, in a court of competent jurisdiction, to compel the attendance of witnesses and require the production by them of books, papers, documents and other materials relevant to any case under consideration. Subpoenas may be served by certified mail, by private process server designated by the hearing authority or by anyone who could lawfully serve said subpoena in a judicial proceeding of a civil nature.
- (d) **Burden of going forward with the evidence.** The charging party shall have the burden of going forward with the production of evidence at the hearing before the hearing authority; provided, however, where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority. Such evidence shall be competent, material and relevant to all matters at issue and relief requested.
- (e) **Evidence.** The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request. The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.
- (f) **Cross-examination.** Every party shall have the right of reasonable cross-examination of witnesses who testify, and shall have the right, upon request, to submit rebuttal evidence. Repetitious questions and examination on irrelevant matters shall not be permitted. Cross-examination shall be subject to reasonable regulation by the hearing authority who is authorized to require the designation of specific persons to conduct cross-examination on behalf of other individuals.
- (g) **Right to counsel.** In any case governed by the procedures established in this chapter, the parties have the right to be represented by themselves or by legal counsel of their choice. The appearance of counsel shall be entered and the hearing authority shall be notified in writing expeditiously following counsel's retention. All parties of record shall be notified simultaneously with the hearing authority.

- (h) **Powers of the hearing authority.** In addition to any other power granted by this article, a hearing authority is empowered:
- (1) To administer oaths and affirmations.
 - (2) To grant or deny requests for subpoenas or issue subpoenas on its own initiative and to call independent witnesses or seek additional evidence to be made part of the record as justice may require.
 - (3) To rule on petitions to quash subpoenas.
 - (4) To rule upon motions, offers of proof and receive relevant and probative evidence, to exclude incompetent, irrelevant, immaterial or unduly repetitious evidence and to give effect to the rules of privilege recognized by law.
 - (5) To regulate the course of the hearing and to allow the record in hearings to remain open.
 - (6) To hold conferences for simplification of the issues.
 - (7) To dispose of procedural requests or similar matters including motions for continuance, to amend a pre-hearing statement and to order hearings reopened, consolidated or grant rehearings.
 - (8) To call, examine and cross-examine witnesses and to obtain and introduce into the record documentary or other evidence.
 - (9) To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof.
 - (10) To take any other action authorized by this article or necessary to a fair disposition of the case.
 - (11) To accept evidence by stipulation of facts which may be introduced at any time.
 - (12) To schedule, suspend or continue hearings to a time and date certain with notification to all parties.
 - (13) Upon its own motion and at the request of an affected party to order that witnesses other than a party be excluded from the hearing room until called to testify.
 - (14) To order that statements of witnesses who are beyond the jurisdiction of the hearing authority or who for sufficient reason are unavailable to testify be taken by written interrogatories or deposition made under oath. The original of any interrogatories, answers thereto or depositions must be filed in the case file of the proceedings.
 - (15) To promulgate rules for witness reimbursement of expenses actually incurred by reason of such witness's required presence at a hearing or if such witness is a County employee promulgate rules for the extension of appropriate leave to said witnesses.
 - (16) To permit additional parties to participate in the proceedings as justice may require.

(i) **Hearing conduct and procedure.**

- (1) Unless otherwise provided by law:
 - a. A quorum of the hearing authority must be present to conduct a hearing. A majority of the persons appointed to any hearing authority shall constitute a quorum. The quorum requirements shall not apply to hearings conducted by a hearing examiner or hearing officer. A ruling of the presiding officer shall stand unless overruled by a majority vote of the members of the hearing authority present and participating.
 - b. All hearings shall be de novo before the hearing authority.
 - c. The members of any hearing authority shall be subject to disqualification for conflict of interest, and suggestions for disqualification of any member may be made on petition of any party.
- (2) The presiding officer of the hearing authority shall preside at hearings and have full authority at all times to maintain orderly procedure and restrict the hearing to relevant and material facts. A ruling of the presiding officer shall stand unless overruled by a majority vote of the members of the hearing authority, present and participating.
- (3) All exhibits accepted shall be marked and held in the hearing file. Those exhibits whose admission is rejected shall either be returned to the offering party or retained in the file with appropriate notations reflecting that the material was rejected as an exhibit.
- (4) Rulings on motions, petitions and objections made during the course of a hearing shall be ruled on as received or as soon thereafter as practicable.
- (5) The ordinary, but not mandatory, order or procedure for the conduct of the hearing and the presentation of evidence is as follows, subject to subsection (d) of section 2A-6 or waiver or such reasonable changes as may be ordered by the hearing authority or by law:
 - a. Disposition of all outstanding preliminary motions and preliminary matters.
 - b. Opening statement of parties.
 - c. Presentation of factual case of appellant: cross-examination of all witnesses thereof.
 - d. Presentation of factual case of responding party: cross-examination of witnesses thereof.
 - e. Presentation of factual case of other interested persons: cross-examination of witnesses thereof.
 - f. Rebuttal evidence of appellant: cross-examination of witnesses thereof.
 - g. Surrebuttal evidence of responding party: cross-examination of witnesses thereof.
 - h. Closing arguments.

- (j) **Sanctions.** The hearing authority may impose sanctions against parties and witnesses for failure to abide by the provisions of this article, or for unexcused delays or obstructions to the pre-hearing and hearing process. Such sanctions may include suspension or continuance of scheduled hearings, dismissals of actions, denial of admission of documents and exhibits and admission of matters as adverse to a defaulting party.

In addition to any other sanction, the hearing authority is authorized to assess any offending party the full cost of verbatim recording and transcription of any hearing delayed or obstructed by such party; and further to assess such party the cost of re-advertisement, if such notification is either required by law or necessary in the discretion of the hearing authority, to give adequate notice to interested or affected parties.

Sec. 2A-9. Emergency hearings.

Where the ordinary processing of any appeal may, due to time constraints, cause injury to any party, the hearing authority may for good cause grant an emergency hearing on its own motion or upon good cause shown by any party thereto. Where an emergency hearing is ordered by a hearing authority, it may suspend or alter any provisions of this article necessary to avert such undue injury; provided, however, that in such cases, the hearing authority shall notify all parties of the operation of this section, and make every reasonable effort to provide substantive due process of law to all parties. All hearings pursuant to section 2A-2(c) of this chapter involving the removal or suspension of a County merit system employee and all hearings pursuant to chapter 41A, rent supplement and assistance program, shall be governed by this section.

Sec. 2A-10. Decisions.

- (a) **Content.** All recommendations and/or decisions of the hearing authority except rulings on preliminary matters or on motions or objections shall be in writing, based on evidence of record and shall contain findings of fact, conclusions of law and an appropriate decision and order; provided, however, any decision stipulated or consented to by the parties need only be reflected by an appropriate written order or consent decree.
- (b) **Evidence required.** All recommendations and/or decisions of the hearing authority shall be based upon and supported by a preponderance of the evidence of record.
- (c) **Voting requirements.** Any decision rendered in conformance with the provisions of this article must have the concurrence of a majority of the voting members of the decision-making authority unless a greater number of votes are required by law. Members of the hearing authority absent during a hearing may vote upon a matter upon written certification that they have read the transcripts and reviewed the evidence of record.

Failure to achieve the necessary affirmative votes shall act as a denial of the relief requested by the charging party by operation of law. No written opinion in this instance shall be required; provided, however, individual members of the hearing authority may file written reasons supporting their respective positions.

- (d) **Time requirements for decisions.** All recommendations and/or decisions of the hearing authority shall be rendered within forty-five (45) days after the closing of the record in the case; provided, however, the hearing authority on its own motion may extend the time for recommendation and/or decision for an additional period upon written notification to all parties.
- (e) **Notification of recommendation and/or decision.** All recommendations and/or decisions of the hearing authority shall be released and sent simultaneously to all parties of record and their counsel.
- (f) **Rehearing and reconsideration.** Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days from a final decision. Thereafter a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. Any request for rehearing or reconsideration shall be in writing, containing supporting reasons therefor, with copies served on all parties of record. Any decision on a request for rehearing or reconsideration not granted within ten (10) days following receipt of the request therefor in accord with subsection (c) of this section shall be deemed denied. Any request for rehearing or reconsideration shall stay the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted such further time or a subsequent decision is rendered. A request for reconsideration or rehearing shall not stay the operation of any order unless the hearing authority so states.
- (g) **Informal disposition.** Where appropriate to the nature of the proceedings and the governing laws, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

Sec. 2A-11. Judicial review.

Any party aggrieved by a final decision in a case governed by this article, whether such decision is affirmative or negative in form, may appeal said decision to the circuit court for Montgomery County, Maryland, in accord with the provisions of the Maryland Rules of Procedure governing administrative appeals. Said court shall have the power to affirm, reverse or modify the decision or remand the case for further proceedings as justice may require. The filing of such appeal shall not stay the order of the hearing authority. Any party to the proceeding in the circuit court may appeal from such decision to the appellate courts of Maryland pursuant to applicable provisions of the Maryland Rules of Procedure.